

# Nebraska Ethics Advisory Opinion 98-1

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## ***Question Presented--***

*Does the issuance of a protection order in which the signing judge has ex parte contact with the petitioner, either in person, by affidavit, or both, give rise to a conflict of interest such that the signing judge should recuse himself/herself from hearing further matters regarding either the same petitioner and/or the respondent, if any criminal or civil matters ensue?*

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## **Conclusion**

The review by a judge of an application/affidavit for a protection order sought by an applicant pursuant to the Protection from Domestic Abuse Act, though such review constitutes an ex parte communication, is both required by the procedural framework of the Protection from Domestic Abuse Act and authorized by the Nebraska Code of Judicial Conduct.

## **Statement of Facts**

A judge poses the question of whether a conflict of interest is created, sufficient to require recusal, if subsequent criminal or civil litigation ensues, when that judge reviews the application and supporting affidavit for issuance of a protection order and/or has ex parte contact with only the applicant present, regarding the issuance of said protection order. Having had the ex parte contact with the applicant, must the judge then recuse himself/herself if the respondent is subsequently prosecuted for violation of said protection order, if a dissolution proceeding ensues, in short if there are any civil or criminal proceedings which follow involving the same parties?

## **Applicable Code Sections**

Nebraska Code of Jud. Cond., Canon 2, 3B(7)(e), and 3E(1)(a)

## **References in Addition to Nebraska Code of Judicial Conduct**

Protection from Domestic Abuse Act, Neb. Rev. Stat. §§ 42-901 to 42-930 (Reissue 1993, Cum. Supp. 1996 & Supp. 1997)

Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 5.01 (2d ed. 1995)

## **Discussion**

The Nebraska Code of Judicial Conduct provides as follows:

CANON 3

A Judge Shall Perform the Duties  
of Judicial Office Impartially and Diligently

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B. ADJUDICATIVE RESPONSIBILITIES.

.....

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to the law. A judge shall not initiate, permit or consider *ex parte* communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

.....

(e) A judge may initiate or consider any *ex parte* communications when authorized by law to do so.

In the usual sense of the term, an *ex parte* communication is a communication between a judge and only one party to a proceeding, which occurs in the absence of any other parties to that same proceeding. Such one-on-one communications would clearly fly in the face of the mandate of Canon 3B(7), namely the "right" of that party "to be heard according to law."

"*Ex parte* communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. *Ex parte* conversations or correspondence can be misleading; the information given to the judge "may be incomplete or inaccurate, the problem can be incorrectly stated." At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, *ex parte* communication is an invitation to improper influence if not outright corruption.

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 5.01 at 145-150 (2d ed. 1995)

However, the Code clearly recognizes that some *ex parte* communications must be permitted, and Canon 3B(7)(e) specifically authorizes the occurrence of such *ex parte* communications.

Section 42-924 of the Protection from Domestic Abuse Act provides for the filing of an application and affidavit for a protection order, and upon the filing of such an application and affidavit, "the judge or court may issue a protection order without bond enjoining the adverse party from (a) imposing any restraint upon the person or liberty of the applicant or (b) threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of the applicant." Unless the protection order requires the adverse party to be removed from the premises, such protection orders do not require either notice to the adverse party or a full hearing thereon after such notice.

In short, the Protection from Domestic Abuse Act cited above requires, and accordingly authorizes, a judge to have the kind of *ex parte* communication contemplated under the act. The act does not require that such protection orders (other than those protection orders which require the removal of the adverse party from the premises) be granted only after a hearing, but instead the act clearly contemplates the issuance of such orders without a hearing. The issuance of such orders follows the review and consideration by the judge of the application and affidavit. The consideration and review by a judge of the application and affidavit are contemplated by the act and authorized under the Code of Judicial Conduct and do not require recusal.

Even after the issuance, or in fact, the denial, of a protection order, that issuing judge need not recuse himself or herself from adjudicating any subsequent violations of that protection order that may be prosecuted, nor need that judge recuse himself/herself from sitting in a dissolution action that might be filed subsequent to the issuance of the protection order.

Obviously, if as a result of the review by a judge of an application/affidavit for a protection order, that judge makes the determination that he or she cannot impartially adjudicate any further proceedings assigned to that judge involving the same applicant, the respondent, or both, then Canon 3 itself would require the recusal. But that decision would be based on the judge's own examination of his or her judicial conscience, and the application of the entire Code of Judicial Conduct, and such recusal would not be mandated merely by the prior occurrence of the ex parte review of the application/affidavit.

### **Disclaimer**

*This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion pursuant to appendix A of the Nebraska Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Ethics Advisory Committee.*

APPROVED AND ADOPTED  
BY THE COMMITTEE ON APRIL 29TH, 1998

*Judge Darvid Quist  
Judge Randall Rehmeier  
Judge Stephen M. Swartz  
Judge Toni G. Thorson  
Judge Lindsey Miller-Lerman  
Judge Cloyd Clark  
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